identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

[redacted]

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B5

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 17 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the Form I-140 petition, the petitioner was [redacted] U.S. Citizenship and Immigration Services (USCIS) records show that the petitioner has since moved to [redacted] and then back to [redacted] so her current employment (if any) is not clear. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits letters from herself and other witnesses, copies of articles, and other documentation of her recent research work.

We note that, at the time of filing, attorney [redacted] represented the petitioner. On appeal, however, the petitioner calls [redacted] her "former attorney," and states that she has no legal representation.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

The petitioner's initial filing of the Form I-140 petition, on June 2, 2008, included no statement from the petitioner or from counsel to explain precisely what the petitioner intends to do in the United States in the future. The petitioner did, however, submit several witness letters describing the petitioner's past accomplishments. Dr. [redacted], associate professor at the [redacted] stated:

> I served as a scientific advisor to [the petitioner] for her doctoral dissertation and research in the Department of Microbiology at the [redacted] from 2000-2006. I can attest that [the petitioner] was an outstanding doctoral candidate and that she was among the very best students I have observed in my 16 years at [redacted]. Her excellence and dedication to genetic research of the human pathogen *Streptococcus pneumoniae* has significantly improved our understanding of the role of the *Streptococcus* PspA protein in immunity. . . .
>
> Although there are vaccines available for *S. pneumoniae* they are not protective for all strains of the organisms. [The petitioner's] work has shown that PspA, a surface protein of *S. pneumoniae* that enhances the virulence of streptococcal infections can be exploited as an alternative vaccine. [The petitioner] demonstrated that antibodies against PspA confer resistance to *S. pneumoniae* infection. . . .
>
> After receiving her Ph.D., [the petitioner] was recruited by a top laboratory where she is currently investigating human immune responses to intestinal pathogens. . . . There is an acute need for trained researchers in this area and [the petitioner's] experience will be of particular value to the United States.

Another [redacted] faculty member, Professor [redacted], stated:

> [The petitioner] conducted research in my laboratory at the [redacted] for a period of five years, from 2001 to 2006. During that time period, [the petitioner] successfully performed two important projects that were funded by the [redacted] Her research achievements during those projects were sufficient to convince me that her abilities are substantially greater than those of the majority of her peers, and that she is able to contribute to future research in the field of microbiology at an exceptional level.

. . . [The petitioner's] studies on the role of PspA vs. the genetic background in overall pneumococcal virulence provided the very first insight in the reported literature as to why some pneumococcal strains were more virulent and more difficult to protect against by anti-PspA antibodies. This was [a] particularly important breakthrough in the development of an effective PspA-based pneumococcal vaccine.

. . . [The petitioner] identified a novel transcription factor that facilitates the survival of the pneumococcus in various host environments. Her seminal work on this highly conserved protein family led to a new understanding of the interactions between host and bacteria during infection. It cannot be stressed enough that the implications of her studies extended well beyond the pneumococcus and have formed the basis for understanding bacterial regulation during infection.

Professor [redacted] of [redacted] described the petitioner's work at that institution:

> A major aspect of [the petitioner's] work involves the investigation of the mechanisms by which immune cells initiate anti-*Cryptosporidium* immunity, a serious pathogen which is responsible for episodes of acute diarrhea in healthy individuals, and chronic diarrhea and wasting which can be fatal in immunodeficient patients such as [those with] HIV/AIDS. . . . Dendritic cells (DCs) are the crucial cells in initiating an immune response. [The petitioner] is a member of a team who is investigating the role of DCs in host response to *Cryptosporidium* infection. . . . Activation of Toll-like receptors (TLRs) expressed on DCs is one of the key first steps that trigger the functional maturation DCs. Our research group has shown that *Cryptosporidium* is recognized by DCs and that it is mediated by TLRs. Elucidating the interaction between the TLRs and *Cryptosporidium* will extend our understanding in DCs response in protozoa infections.
>
> . . . [The petitioner] is also involved in a project studying the host immune response against *Clostridium difficile* toxins. *C. difficile* is the most common cause of antibiotic-associated colitis. . . . During the effort to generate protective anti-toxin antibodies, our research team observed that one particular antibody can increase the cytotoxic effect of *C. difficile* toxins. . . . [The petitioner] conducted follow-up experiments and discovered that the presence of this antibody did not interfere with the intracellular mode of action by toxins. She is currently engaged in conducting further experiments to identify cell surface receptors involved in this phenomenon.

Two witnesses are not from institutions where the petitioner has worked. Professor [redacted] of [redacted] stated:

> I know, from discussions with [redacted], that [the petitioner] has been a major asset to his research program . . . and that she has developed critical insights into host pathogen interactions in gastrointestinal infections. . . .

> My own work clearly has benefited from these studies and I look forward to future progress in [the petitioner's] studies. She is clearly a top research scientist in this field.

Prof. Weiss's *curriculum vitae* shows that he has collaborated with Prof. Tzipori on a number of articles.

Professor J. Glenn Songer of the University of Arizona stated:

> I have never collaborated with [the petitioner], but I am familiar with her reputation as a distinguished infectious disease researcher at [redacted]
>
> [The petitioner's] unique approach to understanding the immune response in *C. difficile*-associated colitis has drawn extensive attention. The results of her research are eagerly anticipated, as it opens up potential targets for development of immune-based therapeutic strategies.
>
> . . . In addition, [the petitioner] is also conducting important research on the host immune response to other intestinal pathogens, including *Cryptosporidium* spp and *Microsporidium* spp. . . . [The petitioner] has used a microarray technique to screen thousands of host genes, and successfully identified those that are responsive to parasitic infections. She has recently presented her work at a conference to both interest and acclaim.

The petitioner submitted little objective evidence to show the "extensive attention" and "acclaim" to which the letters referred. The beneficiary documented her participation in various professional meetings, and submitted copies of three articles that she co-wrote. The petitioner showed two independent citations of one of those articles, and one such citation for another. Both cited articles predate her most recent work at Tufts.

The director denied the petition on May 28, 2009. The director acknowledged the intrinsic merit and national scope of the beneficiary's occupation, but found that the petitioner had not shown that her work merits the special benefit of the national interest waiver. On appeal, the petitioner argues that the director did not give sufficient weight to the witness letters she had submitted.

The opinions of experts in the field are not without weight and we have considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to

an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). The claim of a witnesses, independent or otherwise, that the petitioner's work has earned "attention" or "acclaim" cannot carry the same weight as verifiable, independent documentation showing that to be the case.

The letters submitted with the petition attested to the importance of the petitioner's work but provided little specific information as to how her ongoing efforts have influenced the field. The petitioner, on appeal, claims that the director failed to consider the statements of "four (4) independent reviewers," but three of the petitioner's five initial witnesses have worked directly with her and a fourth has collaborated with one of her mentors.

Two new letters accompany the appeal. [redacted] in his second letter on the petitioner's behalf, provides additional technical details regarding the petitioner's work and states:

> [The petitioner's] studies have brought a breakthrough in our basic understanding of humoral immune response to *C. difficile* toxins, demonstrating that some toxin-specific antibodies may have detrimental, rather than protective, effects on hosts through enhanced toxin activity. [The petitioner's] work . . . is of enormous interest to scientists who will, in the future, design effective *C. difficile* vaccines. [The petitioner] further developed a rapid, ultrasensitive assay for detection of *C. difficile* toxins . . . [that] will no doubt greatly improve the sensitivity and efficiency of the current diagnostic methods.

[redacted] indulges in speculation here, referring to the future development of a vaccine that does not yet exist, and stating that there is "no doubt" that the petitioner's work will "improve the sensitivity and efficiency of the current diagnostic methods." The petitioner has not shown that such improvements have taken place; only that this particular witness believes such improvements to be inevitable at some future time.

The final witness is [redacted], an associate professor at the [redacted], like [redacted] describes the petitioner's recent work in technical detail and asserts that her work "will eventually lead to the development of effective immune-based therapies and novel preventive methods," without illustrating what concrete steps have already occurred in that direction.

The petitioner submits copies of four articles published after the petition's June 2008 filing date, as well as a provisional patent application and materials regarding professional conferences after that date. The mere existence of these materials does not imply eligibility for the waiver, because dissemination of one's work through journals or conferences appear to be routine ways of presenting a researcher's work to one's peers. A patent application demonstrates an effort to protect intellectual property, rather than a self-evident demonstration of the importance of the material to be patented.

Furthermore, the petitioner, on appeal, must demonstrate that the director's decision was incorrect based on the evidence available to the director at the time of that decision. It cannot suffice for the petitioner to show that the petition would have been more persuasive if the petitioner had filed it later, with better evidence. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Therefore, even if the new materials showed eligibility for the waiver, which they do not, we could not fault the director for failing to anticipate the future submission of evidence that did not yet exist at the time of filing.

The only objective evidence the petitioner has submitted to show the scientific community's reaction to her work consists of three published citations, with no article cited more than twice. This level of citation does not show that the petitioner's work has significantly influenced the work of other researchers. One of [redacted]'s collaborators, [redacted], asserted that his "own work clearly has benefited from" the petitioner's efforts, but he did not elaborate. Other praise of the petitioner's work relies on speculation about what may eventually result from that work.

The director, in denying the petition, did not find that the petitioner's research is without value, or that it is of no interest to the wider scientific community. The petitioner has not only sought classification as a member of the professions holding an advanced degree; she has also requested an additional benefit in the form of an exemption from the job offer requirement that normally applies to aliens in that classification (and to aliens of exceptional ability). The burden is on the petitioner to show that she merits that special benefit, even at this very early stage in her career before she has completed her postdoctoral training. The director found that the petitioner had not persuasively shown that she qualifies for the additional benefit she seeks. We agree with that finding. This is not a permanent finding that the petitioner can never qualify for immigration benefits. It is, rather, a finding that she has not submitted sufficient evidence to support this particular petition.

We note that the petitioner's spouse, [redacted] applied for adjustment of status on Form I-485, with receipt number SRC 09 187 52274. The Director, Texas Service Center, approved that application on February 4, 2010 (several months after the filing of the present appeal). Our findings in this decision are without prejudice to any separate proceedings arising from [redacted] adjustment to permanent resident status.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.